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CONTROL OF CORPORATIONS, PERSONS AND FIRMS ENGAGED IN INTERSTATE COMMERCE[1]

By John Sharp Williams,
United States Senator from Mississippi.

I frankly confess that no public question ever gave me the degree of mental embarrassment that this one has, both in trying to diagnose the disease and in trying to suggest a remedy.

For a long time I wandered around in the dark, reading everything I could get hold of and trying to think the thing out as best I could. I found the difficulty lying in my way was not one of making up my mind as to whether we wanted to prohibit trusts or regulate them. I wanted to prohibit them, but in defining what a trust was so as not so to define it as, while prohibiting the trust, to prohibit a legitimate business of some sort.

Mr. Chairman, as long as I attempted to deal with the trust question as a question merely of magnitude, of status, and of definition, with the idea in my mind that there was too little law concerning it, I had more and more trouble. When I got hold of the idea that the trust evils have grown out of too much law—unlimited special privilege granted to corporations by charter laws issued by the states—then I began to see some light in connection with this question.

Mr. Chairman and gentlemen, all right government, spelling the highest expression of civilization, is a government of law, and not of persons; a government of uniform, prescribed, and published legal regulations, and not a government by regulations issued by a man or a board of men from day to day. The former is a government "of the people, for the people, and by the people;" the latter is, as Mr. Robert R. Reed has aptly expressed it, "a government of the day, for the day, and by the day."

In approaching the so-called trust question it is well to inquire first whence the evils arise. Legal provisions in state charters by express or permissive force are the source of all our trusts, monopo-

[1] This paper is an abbreviation and revision of a statement made by Senator Williams before the Committe on Interstate Commerce, United States Senate, February 16, 1912.

lies, near-monopolies, and restraints of trade. Thus the trust evil is one of too much law—not one of too little law—of too much corporate power granted by law. You will note that I do not say "unreasonable" restraint of trade. Restraint of competition is not always restraint of trade; it sometimes is precisely the opposite. Ex-Senator Edmunds gives an instance which is finely illustrative of this point. He says, suppose two mills were grinding corn in a neighborhood where the product of both mills could not be consumed and marketed, and where, therefore, each was grinding on half time and the two were compelled therefore to make up for this sort of inefficient business not only by employing their labor half time, but by charging consumers more than they ought to pay, the overcharge being necessary in order to make up for the time the machinery was lying idle. Suppose that the two companies combined and agreed that the power running one of the mills should be used to saw lumber and the other mill kept at its old work of grinding corn. Here would be plainly a restraint of competition and at the same time an increase of trade resulting in increased production, increased employment of labor, and in cheaper production of meal. I have never understood what a "reasonable restraint of trade" is. A "restraint of trade," in its technical and legal sense, is necessarily a public injury and violative of public policy. I understand that there may be a reasonable and even a beneficial restraint of *competition*, which results in *increase* of trade and in public benefit. I suppose that is what the Supreme Court meant in its late Standard Oil and tobacco decisions. At any rate, it seems to me that that is what I should have said had I been on the Supreme Court.

But to return to the main point: There is not a great evil of combination existing to-day in interstate commerce that has not grown out of law-conferred or law-permitted privileges granted in state charters. I am not alone in this opinion, for Attorney-General Wickersham, in February, 1910, used this language:

> No such comprehensive control over any one of the great industries which were dominated by those large aggregations of capital called trusts could have been attained but through the exercise of powers granted by the sovereign states, and the condition therefore, was strongly analogous to that which arose in the reign of Elizabeth. . . . The problem was complicated by the dual nature of our government. Concerted action by the states was impracticable—it may be said impossible. Efforts at control by one state were evaded first by removal to another, then by the device of holding corporations.

So far the Attorney-General and I agree. Afterwards we begin to differ. We begin to differ the moment we seek a remedy. He looks to a "new nationalism," either through Federal regulation of acknowledged but allegedly unavoidable "near-monopoly" by a body similar to the Interstate Commerce Commission, or through Federal incorporation. I don't mean that he would himself use the phrase "new nationalism," but that is a phrase which was used by a very distinguished and a somewhat vociferous ex-President to describe the same thing. I would look to what Governor Wilson, of New Jersey, calls "a new stateism;" to a more exact performance of their proper functions by the states; and to a more vigilant and careful guarding of the conditions prescribed in their charters by the states. The so-called "new nationalism" is nothing less than something worse than old "Hamiltonian federalism" revamped.

There is not in all the Scripture to me a sweeter phrase than that of St. John, in which he advises us to "reason together in brotherly love." Thus reasoning, let us see in the first place what is the object of all patriotic men seeking to be guided by the public welfare and not solely by their own private business interests? I think the answer is that that object is to divorce big business from government and government from big business as its ally. How has government been the ally of big business? Answer: By laws of incorporation, expressly or impliedly authorizing and permitting and making possible dishonest, unfair, or oppressive methods. Some one says: "Let government keep its hands off of business;" but the truth is that the interference of government with business began with the charter which created the corporation and conferred upon it, or permitted it to exercise, the powers which it exercises. The trouble is existing legislation, charter-enacted legislation. Without this first interference of law, the evils could not have existed. Just for one example: No corporation under the common law could own stock in another corporation, and except for an express power given to it in its charter, it cannot do it now. One can not too much emphasize the fact that the power to do wrong, dishonest, unfair things, conferred by charter law, is the source of all the evil, and that without this no trust, and no harmful big business, no monopoly, nor near-monopoly, could exist. If a man could, for example, without special privilege granted by law in a charter, raise all the cotton in the United States now being raised at a profit to himself and put it

on the market at four cents a pound; if he could do this by improved methods of cultivation and by improved machinery and by superior administrative ability, honestly and fairly, employing more laborers at higher wages, no harm could in the long run result to humanity, nor could he long maintain the relative magnitude and seeming absorption of the business, because other people would learn his methods and competition would soon set in on new lines, bringing about still further increased production, coupled with a still larger employment of human activities and with decreased price to the consumer. If one could, without any special privilege granted by law in a charter, make shoes at a profit to himself at $1.50, which now cost $3 to make when made by other people, no matter how large a business he could build up for himself, he would be doing something infinitely beneficial in the long run to the human race. You may depend upon it that men's abilities do not sufficiently differ one from another (they being first all restrained from indulging in wrongful, dishonest, or oppressive methods), to enable any one man or set of men to build up a monopoly or near-monopoly, or a large business "in restraint of trade." Men differ more with regard to scrupulousness and unscrupulousness than with regard to ability.

This brings me to the next point, which is, that the trust evil is not a question of magnitude, nor a question of status, but is a question of methods, and of law-granted special privileges. Federal incorporation is, in my opinion, not necessary, even if its constitutionality were not doubted. It spells governmental and industrial centralization; it spells more laws and more offices. Nor is Federal License—the Bryan remedy—necessary. License by an administrative bureau spells government by men and not by laws; it spells more and more bureaucracy, and in the long run it spells corruption and dry rot. What is worse, both of these methods spell not only centralization, but centralization of evil by Federal authorization, for so-called regulation of trusts means that.

Those of us who love local self-government—and the liberty and civilization of the world have grown out of it, and every government which has ever risen and fallen has fallen through the toppling over of the top-heavy machinery of government—those of us who believe that "government is a convenience and not a providence;" those of us who believe that the Federal Government is too remote from the people to be well watched by them, or to be capable of watching

them well, want to cure the existing evil of too much centralization of business and of industrialism by a decentralization of it.

Our remedy is a plain one, to wit, to prevent the evil by refusing, when evil methods are permitted and injurious powers are given by charters, to permit the artificial persons thus chartered to engage in interstate commerce. We would make it a crime for those thus chartered to commitil ev to do business anywhere in the United States beyond the borders of the state chartering them. Let that state have the full benefit. It is its sovereign right to have it, but not beyond its own borders. It can not license wrong to enter into other states any more than it can be allowed to decree a spread from its own borders over other states of yellow fever or bubonic plague. We would, therefore, preserve local self-government by the states, but in essentials would persuade uniformity of state charter legislation by the exercise on the part of the Federal Government of its right by uniform prescribed law to define conditions and regulate the character of artificial persons permitted by it to engage in interstate commerce. I doubt whether Congress has the power under the pretext of "regulating" commerce between the states to destroy commerce between the states. Whether it have the power or not, I know it has not the right. But it has the power and the right and the duty even, in "regulating" that commerce, to destroy fraud, dishonesty, unfairness, and oppression, and to say that persons chartered by a state with powers so large as to permit them to commit fraud, dishonesty, unfairness, and oppression shall be penalized for the act of engaging at all in interstate commerce, until they have gone back to the state of their incorporation and procured a charter properly limiting their powers. You will see the importance of this when you remember that New Jersey, and I believe Delaware also—though I am not so sure of this last statement—have in some cases given powers to corporations so extensive, and in the opinion of the New Jersey legislators so oppressive, that the legislature has forbidden the exercise of those powers within the State of New Jersey. The power I claim here is not denied. On the contrary, Mr. Wickersham, whom I like to quote, because he is a man of great power and lucidity of thought and expression, in a public speech at Duluth on July 19, 1911, is reported to have used the following language:

> If Congress should enact that no corporation engaged in interstate commerce shall hereafter acquire stock of any other corporation so engaged, and that unless

such corporation should dispose of all stock held by them in other corporations engaged in interstate commerce within some specified period, they should be prohibited from engaging in interstate commerce until they did so dispose of such stock, the ax would indeed be laid at the root of the trust evil.

My objection to regulation of so-called trusts by an executive bureau, issuing regulations or licenses, can be expressed by me in no stronger language now than the language which I used in a letter on September 27, 1911. I shall take the liberty of inserting it:

> I can imagine nothing more dangerous to the American Republic than control of great corporations by a Federal bureau subject in its turn to a political administration of either party, excluding or admitting participation in business substantially at the whim and caprice and by the favoritism or enmity of the head of the bureau, influenced by Senators, Speakers, and Presidents, whose "pull" would be in favor of "good trusts" and whose frowns would be for "bad trusts." In such a case "good" would come to mean subservient. The remedy is to exclude trusts from interstate commerce, but to exclude them not by the fiat of a bureau (which in the last analysis is a man influenced by other men and acting secretly, with subordinates forbidden to give out information), but to exclude them by fiat of law, providing that corporations having charters conferring powers broad enough to establish monoploy or near-monopoly and not limited as they should be in the interest of the public shall be excluded . . .

I added, "this remedy seems to me to be the right one, efficient, sufficient, operating in the open and by force of uniform prescribed law." Please remember the phrase: "By force of uniform prescribed law;" a law published and known to all men, or knowable by all men, as contradistinguished from an uncertain, unforeseeable, spasmodic, inconstant, bureaucratic interference with business by a bureau working in secret, with regulations to prevent its employees from communicating to the public or even to Congress, knowledge of its methods or its work.

Those of you who know me, know that I do not indulge in denunciatory rhetoric. That is no way to "reason together in brotherly love," nor is it any way to procure the advantage of the cool light of reason in the analysis of a subject. Still you will excuse me for asking you this question: Who are they who are now beginning most strenuously to demand some sort of Federal "license" or "incorporation" for the regulation of trusts, so-called? I shall not even answer my own question, except by asking you one more: Are they not principally, if not altogether, those who are beginning to feel the halter of the present law draw? Unfair, dishonest, or oppressive big business,

which alone can build up monopoly, or near-monopoly, must be never licensed nor regulated nor incorporated by the Federal Government. It must be outlawed from interstate commerce; stamped out of existence; and it must be done by prescribing the limitations and conditions of "charter power" granted to artificial persons engaging in interstate commerce. The Federal Government is powerless to outlaw it within a state which may have chartered it, so long as it confines itself and its operations to that state, but it can exterminate it in interstate commerce by refusing to let it so much as enter that broad arena. It has the power and the right to do it. But above all let us emphasize the truth that the conditions to be imposed upon business in interstate commerce should be imposed by prescribed rules of uniform law, not by bureau enforcement of law to-day and bureau dispensation from the operation of law to-morrow. Nay, not even by presidential enforcement of law to-day and by presidential dispensation from the operation of law to-morrow.

Our English forefathers sent one king to the scaffold, chiefly because he arrogated to himself the possession of a degree of superior wisdom which would entitle him to dispense with laws which in his opinion were unwise, unjust, or destructive of kingly prerogative. The throne of another one was declared abdicated exclusively for that reason, although the law whose enforcement he suspended was wrong-headed, vicious, and tyrannical. Rely upon it, that if the law be the master, and be uniform, then big business which is not unfair nor oppressive nor dishonest nor "in unlawful restraint of trade" will not have a hair of its head touched, nor have it even so agitated as to stand on end, by the uncertainty of what the morrow shall bring forth. Why? Because its methods will be clean, honest, fair, and unoppressive. No man can make it afraid—only the law, and of that everybody ought to be made to be afraid. It need ask permission to do business from no man or men—not even from a chief executive. If it should be foolish enough to go to one and ask a question of that sort, the reply from a right-thinking President would be: "This is not a question for me to settle, but one for the judiciary to settle." And if he were further asked: "But I am uncertain about the law, and I want your construction of it," the right President's answer would be: "I am not your attorney; consult your attorney; and if you have no confidence in your old one, get you a new

one." The plan of the bill introduced by me involves not one single additional Federal bureau or employee—not one dollar of additional Federal expense.

Now, having laid down the proposition that the evil is to be met by prescribed charter conditions, that ought to be prerequired, to permit a corporation to engage in interstate commerce, we will ask what are some of these conditions? Mr. Robert R. Reed, of New York, and I—he chiefly, and deserving most credit for it, if there be any credit in it—have undertaken to prescribe them in Senate bill 4747, which is a revision, leaving out some things and inserting some things, of a bill introduced by me during the extra sssion.

I am going to incorporate that bill right here in full, so that you may read it.

The bill referred to is as follows:

[S. 4747, Sixty-second Congress, second session.]

A BILL *to prescribe the conditions under which corporations may engage in interstate commerce and to provide penalties for otherwise engaging in the same.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no corporation shall engage in commerce between the States or Territories or in the District of Columbia by the purchase, sale, or consignment of any article of commerce, or otherwise, directly or indirectly—

First. Unless it is organized under laws with a charter that—

(*a*) State the business in which it is authorized to engage and the properties it is authorized to acquire;

(*b*) Provide that it shall have only such powers as are incidental to such business, and shall not have any power to hold the stock of any other corporation or association, to do any act or thing in restraint of trade, or to do anything outside of the state of its incorporation which it is not permitted to do therein;

(*c*) Provide that all its stockholders shall have an equal right to vote according to the number of shares held by them, respectively, at all meetings and for all directors, subject to any general limitation on the number of votes that may be cast by a single stockholder;

(*d*) Provide that no other corporation, association, or partnership shall have any vote or voice, directly or indirectly, in its affairs, and that no person representing, directly or indirectly, any competing business as owner, stockholder, officer, employee, or agent thereof, or otherwise shall have any such vote or voice, directly or indirectly, in its affairs or be eligible as a director or officer thereof;

(*e*) Provide that its capital stock shall be fully paid or payable, and permit it to be paid in property or services only when the value of such property or services has been determined according to the fact upon competent and specific proof under oath filed in a designated public office;

(*f*) Limit its surplus at any time to fifty per centum of its outstanding capital stock and its indebtedness at any time to not more than its outstanding capital stock and surplus;

(*g*) Provide that such corporation shall by an amendment of its charter be subject to and comply with, and, if necessary, shall accept, any requirement that may be made by the state of its incorporation and with any requirement that may be imposed by Congress as a condition of its right to engage in interstate commerce.

Second. Unless it is conducted and managed in conformity with the said provisions and limitations, and is organized under the laws of a State, Territory, or District in which its executive offices are located and its directors' meetings regularly held.

Third. If it, directly or indirectly, of itself or in connection with others, destroys or seeks unfairly to stifle fair competition in any part of the United States in the manufacture, production, mining, purchase, sale, or transportation of any articles of commerce not the subject of any patent, copyright, or trademark held by it either by making or effecting exclusive contracts, rights, or privileges relating thereto, by restricting its customers or other persons with regard to price, territory, or otherwise, in freely buying, selling, or transporting any such article, by securing the monopoly or control of raw material or sources of supply or of any business connected therewith, by temporarily or locally reducing prices with intent to stifle competition, by accepting rebates, or by any other act, device, or course of business that is unfair and tends to secure an unfair advantage and unreasonably and unfairly to destroy competition.

SEC. 2. That every contract made in violation of this act shall be void, and no corporation or association shall bring or maintain any suit or proceeding in any court of the United States unless it is organized, conducted, and managed as required by section one, nor shall this provision prevent the removal of any such suit or proceeding to such courts where such defense may be available to the defendant.

SEC. 3. That the prohibitions of section one and section two shall apply to any association membership in which it is represented by shares, and the word "association" used in this act shall include any joint-stock company, business, trust, estate, or any form of association used for business purposes; but said prohibitions shall not apply to any corporation or association not engaged in business for profit or engaged exclusively in any one or more of the following businesses: Education; a railroad or other common or public carrier of property or persons or messages; banking; insurance; the supply of water, light, heat, or power; or engaged exclusively and independently in any business or businesses the substantial bulk of which is carried on in foregin countries or exclusively in any one State or Territory or District, and which does not involve the transmission of goods from one State or Territory or District to another, nor the purchase, sale, or consignment of articles commonly the subject of commerce between the States and Territories, and actually intended for or becoming the subject of such commerce.

SEC. 4. That no person or persons shall form, operate, or act as or for a corporation or association for the purpose or with the effect of violating this act,

or conspire thereto and of themselves or by co-conspirator do any act or thing to effect such conspiracy.

SEC. 5. That every corporation, association, trust, or person violating this act shall be subject, upon conviction thereof, in case of a corporation or association, to a fine not exceeding ten per centum of its capital stock, or to a perpetual injunction against engaging in interstate commerce, or both, and in the case of a person, to a fine not exceeding ten thousand dollars for each such violation, and, if the violation is willful with intent to defraud or to create a monopoly or unfairly to stifle competition, to such fine and imprisonment for not exceeding five years.

SEC. 6. That the act of February eleventh, nineteen hundred and three, relative to the expedition of certain suits in equity, and sections four and five of the act of July second, eighteen hundred and ninety, known as the Sherman Anti-trust Act, shall apply to all proceedings and suits in equity under this act.

SEC. 7. That the purchase, sale, or consignment of any article intended to become and actually becoming an article of commerce between the States or Territories shall be deemed to be an act of engaging in such commerce under this act.

SEC. 8. That the foregoing provisions of this act shall take effect January first, nineteen hundred and thirteen, but shall not apply to corporations or associations having a capital stock and surplus under ten million dollars until January first, nineteen hundred and fourteen.

SEC. 9. That any corporation or association organized, conducted, and managed as required by section one shall, after the passage of this act, be entitled to engage in commerce between the States and Territories, and to carry on its authorized business relative to such commerce in any part of the United States, subject to the provisions of this act and to all present laws of the United States, and to future acts of Congress, and to the general laws and taxing power of any State, Territory, or District in which it may do business.

Some of the salient points of it are these: First, that no corporation shall engage in commerce between the states unless it is organized under laws with a charter that, among other things, contains these things as prerequisites: First, provides that "it shall have only such powers as are incidental to such business," and "shall not have any express power to hold the stock of any other corporation or association."

Now, remember that without an express power in its charter no corporation can hold the stock of another.

Nor "shall it have the power to do anything outside of the state of its incorporation which it is not permitted to do therein." Another salient point is that its charter must provide "that no other corporation engaged in any competing business shall have any voice or vote directly in its affairs," and that "no person representing, directly

or indirectly, any such corporation, as owner or stockholder, or as an officer, or an employee, or an agent, shall have any such vote or voice," "nor shall any such person be eligible as a director or officer therein." This provision, which seems to me very important, covers this: That where one person shall hold stock in two or more corporations engaged in competitive business such persons "shall not have the right to vote his stock at a stockholders' meeting," or in any other way. The reason for that provision is this: After the people who want to organize injurious big business had been driven from the technical "trust" method and were about to be driven from the "holding-company" method, they proceeded to make arrangements whereby certain men held stock (sometimes exchanging stock with one another for that purpose) in all of the competing companies, and thus by the election of directors at stockholders' meetings brought into effect combination and pooling arrangements with one another among the several competing companies. Now, you can not provide that John Smith can not buy stock in any corporation he chooses, but you can provide that if John Smith owns stock in two or more competitive corporations he shall not have a right to vote that stock at a stockholders' meeting in either of them, because the state creating the corporation has a right to regulate the manner in which the artificial person shall hold its meetings, how its members shall vote their stock and carry on its business. And Congress has the power to say that if this limitation do not appear in the state charter, then this state creature shall not engage in "trade between the states" or in foreign commerce, if Congress choose to go that far. This strikes me as a highly important feature of the bill.

I had not time this morning to read the paper at home; but coming up to the Capitol on the street car I observed this in the Washington *Post*. It is headed, "John D.'s votes rejected. Waters-Pierce tellers defy mandamus in stockholders' meeting. Charge attempt is being made to perpetuate Standard Oil trust under new system."

Now, the Standard Oil trust has just been dissolved into its original, or into some sort of subordinate elements. John D. Rockefeller and those men who controlled the Standard Oil trust presented themselves at a meeting of the stockholders of one of these subordinate corporations with a large amount of stock; and those people

stated if they were really dissolved it was not good faith for the Standard Oil Co., substantially, to come in with a majority of the stock to elect the directors and to control and dictate the policy of the business of this company, which is the Waters-Pierce Oil Co.

The newspaper article referred to is as follows:

ST. LOUIS, MO., *February* 15, 1912.

In a bitter fight which raged to-day at the stockholders' meeting for annual election, Henry Clay Pierce and his associates checkmated the effort of John D. Rockefeller and the Standard Oil interests to take absolute control of the Waters-Pierce Oil Co. The prize at stake is shown by sworn testimony in a recent suit that the Waters-Pierce concern in one year declared a dividend of $240,000. The capital stock is $400,000.

Although Standard interests own 68 per cent of the stock of the company, the Pierce interests refused to count the ballots of John D. Rockefeller, John D. Archbold, and their associates, on the ground they were attempting to perpetuate the Standard Oil trust under a new system.

The Rockefeller-Standard Oil interests filed a mandamus suit to compel the tellers to count the Standard Oil ballots; but the tellers, appointed by Pierce, refused to accept them and declared the Pierce slate of directors elected. The controversy will be fought out in a court beginning before Judge Kinsey Saturday, when the alternative writ of mandamus comes up for argument.

The move of the Rockefeller-Standard Oil interests to exercise control over the Waters-Pierce Oil Co., according to a statement given out by one of Pierce's representatives, is part of a country-wide plan to perpetuate the oil monopoly. The good faith of the Standard Oil people in complying with the decree of the United States Supreme Court dissolving the Standard Oil trusts was attacked in the Pierce statement.

Now, if there had been the law which I propose, there would have been no necessity to object to the lack of good faith, which was indicated by the fact that, although the Standard Oil trust had promised to abide by the dissolution decree of the court, it was attempting here in one case, and doubtless will attempt in many other cases later, to control the entire business of the subordinate companies acting ostensibly independently now, but which were formerly controlled by all of them together. They would have been met at the door with: "It is all right; you will get your dividends. You can acquire an interest in this business, but you can not vote at a stockholders' meeting."

Think a minute. Suppose that were the law to-day. The Attorney-General would not be troubled with "reorganizing" the Standard Oil Co. and the American Tobacco Co. after the courts

had dissolved these great trusts into their original elements, or had, at least, dissolved them into subordinate elements. Suppose the law were that no stockholder in more than one oil or tobacco company could vote in any? Each man who found himself possessed of stock in two or more of them would find himself in the condition where he would be impotent, because he could not exercise any power in organizing and controlling either company and would proceed at once to sell the stock in all but one, so that he might have some regulative control in at least that one. This would be especially true of those men who entertain monopolistic purposes "in unlawful restraint of trade." It would not cost them very much sacrifice to sell their stock in all but one; in fact, they would soon arrive at an arrangement by which A would exchange all his stock in corporation A for an equal amount of B's stock in corporation B. Another very important thing in the bill, I think, is the provision that where property or services are taken in lieu of cash in payment of stock, then the value of such property or service must be "determined according to the fact" upon "competent and specific proof under oath, filed in a public office," to be designated in the charter. Likewise, charters should, as they are required to do by another provision in this bill, limit the amount of surplus and indebtedness by fixing a proportion which these ought to bear to the capital stock.

At first I had an idea of undertaking also to limit the capital stock of corporations engaging in interstate commerce, still having confusedly in my mind the idea of mere magnitude as an evil. I found it utterly impracticable to do so. I could not fix in dollars and cents any amount beyond which a business would be *ipso facto* harmful and this side of which the same business would be beneficial, nor can you or any other man do it, in my judgment. I therefore came to the conclusion that the great evil of watering stock could be met only by these two provisions: First, that stock should be paid for in actual cash, or if not paid for in that way, should be paid for by services or property, with their valuation fixed by *prescribed rules on public proof under oath;* and, secondly, that the surplus and indebtedness should bear a percentage proportion to whatever capital stock the company had, thus limited, been permitted to issue.

Nor was I able to find any percentage line of demarcation that seemed even to my mind satisfactory. I could not say that if a

company did 51 per cent of the business of the country in a certain line that was necessarily a harmful business, and if it did 49 per cent it was necessarily not a harmful business. It is not a question of magnitude. It is a question of methods, or, rather, *of power to exercise oppressive methods.* If a corporation have the power, you may be sure it will exercise it, because there is profit in its exercise.

I think perhaps one of the most important provisions of the bill is clause 3 of section 1. It is intended to meet unfair methods which are daily practiced by some of the most oppressive of the great corporations. For example, the Sugar Trust has held its power over the trade very largely by prescribing that its customers shall sell sugar at a price to be dictated by it from week to week and day to day. Again, many great concerns in this country sell goods to merchants at a certain price upon the condition that they shall export these goods and shall not give American citizens the benefit of the price at which they were bought. Many other of the so-called trusts keep their throathold upon American industry by prescribing that their customers shall not sell outside of a certain territory; some others, that their customers shall not buy from others engaged in producing competing articles; others have gone so far as to sell upon the condition that their customers shall not sell even within the United States below a retail price fixed in the contract or branded on the package. A man in Memphis, Tenn., did a great public service by carrying one of these contracts through the courts up to the Supreme Court, who pronounced it void. But we do not want to make every man go into a long and expensive litigation to arrive at his rights. Another example familiar to most of us is to be found in the great shoe industry of this country, which is to-day shackled by the fact that the United Shoe Machinery Co. will not sell them at all certain machinery for bottoming shoes—or for doing something for shoes; I think it is bottoming them—a device which because of its great value has become absolutely necessary to the shoe industry—or even lease that machine unless the shoe factory leasing it agrees to buy a whole line of other machinery from this same company, or not to buy like machinery from anybody else. This clause 3 in section 1 is intended to meet all these evils by having the charters state that the corporation is forbidden to "destroy or seek unfairly to stifle fair competition" "by making or effecting exclusive contracts," . . . "by restricting its customers, or

other persons with regard to price or territory, or otherwise, in freely buying, selling, or transporting" the articles purchased.

Another great evil, which is known to all of us, is the evil of temporarily or locally reducing prices solely for the purpose of driving out competition; reducing these prices below a fair competitive rate and then afterwards, the competition being driven out, raising them to whatever level the monopolistic corporation may choose, always high enough to recoup the temporary or local loss. The Standard Oil Co., for example, drove the Marietta Oil Co. in that way out of a healthful competition existing within a restricted field. Within this restricted field the Standard Oil Co. reduced the price of oil to a point below the cost of production and sold at a loss until the Marietta Oil Co. was destroyed.

Another instance familiar to all of us is the manner in which the Bell Telephone Co. operates. It is a great combination, extending all over the United States. There are many independent local companies which compete with it upon limited areas. The Bell Telephone Co. will enter these areas, reduce the prices for the use of the telephones to a point where no telephone company, not even itself, could make a living at it. It doesn't hurt the Bell Telephone Co., because it recoups by its profit elsewhere while it is suffering loss in the restricted areas, but it serves its purpose to drive local companies out of existence. Then, as soon as they are driven out of existence, the great company raises its prices.

The Legislature of the State of Mississippi used a little provision in a public law which cured that evil very nicely; they said that wherever a telephone company announced a certain price that that price should be held by what you call the public-service commission in most of your states, but it is the railroad commission in Mississippi, to be "a fair competitive rate" and above which the company should not charge. There was a date fixed after which this should be a law. Before that date arrived the Bell Telephone Co. had everywhere instituted "fair competitive rates," because it could not afford to have a rate below the cost of service declared by the commission to be a fair competitive rate.

Of course there are certain corporations to which this act, like all other acts regulating interstate commerce, should not apply. They are excluded in section 3 of the act from the operation of its provisions.

I will only add that the bill to which I call your attention gives ample time to corporations now engaged in interstate commerce to "organize" by going back to the several states of their incorporation or to other states and getting new charters complying with its condition.

Don't you think that even "big business" men ought to admit that this is better than reorganizing in each case, after lawsuit and in accordance with the provisions of a decree of a court of equity, without definite knowledge beforehand of how they ought to reorganize, even if they wanted to? The bill, of course, exempts no existing criminals from already-incurred penalties.

One other thing: It is supplemental and not supercessional of the Sherman law and repeals that law only in cases where it conflicts with it. In cases where there is conflict, of course, the last law counts.

One word more: Of course I want to say that this bill is chiefly valuable as giving the idea of a remedy. I attempted to put in it the provisions that I thought ought to be prerequisites to engage in interstate commerce. Of course you may think that there are others of much more importance, and you may think that some of these are not important; but the plan remains still the same.

I arrived at the conclusion after talking with some people who knew more about it than I did, that if the surplus was limited to 50 per cent of the outstanding paid-up capital stock and the indebtedness at any time was not to be more than the outstanding capital stock plus the surplus, that that would prevent or tend to prevent overcapitalization or monopoly or near-monopoly.

Now, it may be that the indebtedness ought to be a less percentage than that which I have indicated. In the bill you will notice that I merely say it is not to be at any time more than the outstanding capital stock and the surplus. It seemed to me that whenever a corporation gets to the point where its indebtedness is more than its outstanding surplus and all its stock, it is about ready to go into the hands of a receiver anyway.

SENATOR BRANDEGEE: I do not catch clearly your idea of the danger of having more than 50 per cent surplus. What is there dangerous about having a large surplus, if it earns it?

SENATOR WILLIAMS: It is required in fixing its capital stock to have it paid up, and it is required to go to the state authorities

when it wants to increase its capital stock. You see, it could increase its financial potency and evade the appearance of real overcapitalization just as much by building up a surplus with which it could work as by direct watering.

SENATOR BRANDEGEE: I have had no opportunity to read this bill, because it has just been handed to us. What do you provide in here about watered stock? You referred to that in your remarks, but you did not go into it in any detail.

SENATOR WILLIAMS: Well, I tried in the first bill, Senator, to fix a limit, but I could not do that. It was not satisfactory, even to me. Then, finally, I fixed this provision that I told you about.

You will notice that wherever one of these companies is overcapitalized it is not by cash stock, but by taking other plants or property or services and issuing stock for them. I require that wherever they take services or property, instead of money for stock, that they shall be valued by a public officer indicated in the charter, upon proof under oath made before him.

SENATOR BRANDEGEE: I understand that, but this is not the exact point I am inquiring about.

SENATOR WILLIAMS. I think that would prevent overcapitalization; that would prevent watering stock.

SENATOR BRANDEGEE: That is true as to that.

SENATOR WILLIAMS: Yes.

SENATOR BRANDEGEE: What I am trying to get at is——

SENATOR WILLIAMS (interrupting): You mean what I suggest as a remedy for stock already overwatered in already existing corporations?

SENATOR BRANDEGEE: Yes.

SENATOR WILLIAMS: I have nothing satisfactory to my own mind. I did not attempt it.

SENATOR BRANDEGEE: What I mean to suggest is this: If your bill was law, it would of itself prohibit corporations which at present have got watered stock out—although the stock may be earning dividends—it would prohibit those corporations from continuing in commerce among the states?

SENATOR WILLIAMS: No; I am sorry to say it would not.

SENATOR BRANDEGEE: Why not?

SENATOR WILLIAMS: Because they would just go on. This applies, of course, to their coming in with certain charter provisions

which are prerequisites—if they came in with charter provisions, it would affect all future watered stock, but not what they have already watered. I am sorry it does not, but I could not study out any way of doing that. Therefore I did not put anything in the bill. It ought to be done. That is, I do not mean that an overwatered corporation ought to be prohibited from entering into interstate commerce, but there ought to be some way of forcing them, either in this bill or in some other bill, if I may use the phrase, to "unwater" their stock.

THE CHAIRMAN: Senator Newlands, you may interrogate.

SENATOR NEWLANDS: This bill is in the nature of a Federal charter?

SENATOR WILLIAMS: No, sir; it is a Federal regulation of interstate commerce forbidding people of certain character with certain chartered powers derived from the states from engaging in interstate commerce and penalizing them if they attempt it.

SENATOR NEWLANDS: You do not regard it then as in the nature of a Federal charter to state corporations which are engaged in interstate commerce?

SENATOR WILLIAMS: No, sir.

SENATOR NEWLANDS: But simply as prescribing the conditions upon which they shall enter into interstate commerce?

SENATOR WILLIAMS: Yes, sir; and prescribing that if they have certain powers which enable them to do certain things in the judgment of Congress wrong or too large that they shall not engage in interstate commerce. The theory of the bill is this: That the state has a right to charter anybody to do anything the state pleases, except in violation of the Constitution of the United States, and the Congress has the right to say that that creature of the state shall not engage in interstate commerce unless it does it upon terms and conditions prescribed by Congress.

SENATOR NEWLANDS: Would you expect this bill, if passed, to work reforms in the corporation laws of the various states?

SENATOR WILLIAMS: Yes, sir; every one of the so-called trusts would have to go back to the states for new charters. I fix a time at which the bill shall go into operation, and any corporation which had not complied with the prescribed conditions made prerequisite by reorganizing and getting a new charter—that would be the sole reorganization needed, in compliance with the provisions of this bill —would be afraid to continue in interstate commerce.

SENATOR NEWLANDS: Now, assume that this bill should be passed and it should go into effect, and that an individual state should not change its corporation laws so as to be in harmony with it, what would happen to the corporation?

SENATOR WILLIAMS: That corporation would go to some other state and get a charter, just as a company that desired to do business in Mississippi goes now to the State of New Jersey, because the charters granted by the State of New Jersey contain greater power. Just, for instance, as when I left home a little company that was trying to operate an overhead trolley line in the country had a charter from New Jersey, not from Mississippi, and some time prior to that one faced me with a charter from South Carolina. They do not like Mississippi corporation law much and they get their charters outside of the state. They could do business in the state just as well. If some company chartered by Nevada, let us say, went to the Nevada Legislature and said, "We want to get a new charter in accordance with these Federal requirements," and the Nevada Legislature refused to give it to them, they would go to some other state and get it. They would have no trouble in getting their charters amended or new charters granted.

SENATOR NEWLANDS: Whom would you expect to enforce this law?

SENATOR WILLIAMS: The courts and juries and grand juries.

SENATOR NEWLANDS: And you would rely upon the Attorney-General, too?

SENATOR WILLIAMS: Yes; and the different United States district attorneys throughout the country, and the grand juries throughout the country, and the petit juries throughout the country, and public opinion moving them. One of my very objects is to not have it the business of any one man or set of men either to execute or dispense with the execution of the rules. I make it just like the law against petit larceny or any other crime.

If you left it to the grand juries and petit juries of the country to execute the law, just like you do any other law, the abuse of non-enforcement would be much less apt to occur than if there were a bureau or some man, or set of men, to do it. In the first place, a bureau could not keep its eyes on the whole country if its members wanted to, and in the second place, they would be amenable more or less to some sort of "influence." Somebody might come down and

explain to them that what they were after, and what they wanted to do, was "not a bad thing to be done; that they were just doing it altruistically and for the benefit of the public," like the Steel Trust persuaded Roosevelt when it absorbed the Tennessee Iron and Steel Co. Without any corruption or anything else they might persuade a very good man to suspend the operation of the law.

SENATOR NEWLANDS: That same influence can be brought to bear upon a district attorney or the Attorney-General, could it not?

SENATOR WILLIAMS: Not near as easily upon them and upon the grand juries and petit juries as it could upon some one bureau upon whom the concentrated fire of all these great business interests was directed.

SENATOR POMERENE: Senator, if I understood you correctly, you made a statement that you did not intend to in any way modify or repeal the Sherman anti-trust law except as it might be inconsistent with this?

SENATOR WILLIAMS: Yes.

SENATOR POMERENE: In what respect would you regard it as inconsistent with the provisions of this bill?

SENATOR WILLIAMS: A corporation at present under the Sherman law, with an express power in its charter of holding stock in competitive corporations, can do interstate business and commerce. Under this bill it could not. That is one instance. A corporation which had locally or temporarily reduced prices below a fair competitive rate for the purpose and "with the intent," as this bill provides, "to stifle competition," can do business under the Sherman law but could not under this bill. There are lots of provisions here under which, after the passage of the law, a company, without amending its charter, could not do business, but can do business now under the Sherman law subject to a lawsuit to see whether or not.

By the way, there is a provision in the bill that I forgot to mention; a provision excepting of course from the operation of the bill business carried on in consequence of patents and copyrights. That goes as a matter of course and of legal statutory necessity.

I think one of the things that recommends the bill is, that it leaves these people to go back to the state legislatures and get the proper charters, which they can do. It *induces and persuades* the state legislatures to a uniformity of corporation charter law, and it

does not so disturb the equilibrium of business as to hurt a single rightful legitimate interest of any description. If you notice, the bill strikes throughout only at wrong methods, dishonest methods, and oppressive practices, and in so far as stamping them out of existence would disturb any existing business, of course an existing business of that sort ought to be disturbed; but it does not disturb any other sort of business, in my opinion.